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No. 90-16113

In The

Supreme Court of the United States

October Term, 1991

SIDNEY BROOKS,

Petitioner,

vs.

SULPHUR SPRINGS VALLEY ELECTRIC COOPERATIVE, INC. and ARIZONA CORPORATION COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals properly affirm the district court's grant of summary judgment dismissing Sidney Brooks' complaint against the Arizona Corporation Commission and the Sulphur Springs Electric Cooperative for lack of subject matter jurisdiction, and find that the Commission was cloaked with immunity under the Eleventh Amendment and both the Commission and the Cooperative were shielded from the suit under the Johnson Act?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Sidney Brooks is a customer of respondent Sulphur Springs Electric Cooperative, which is regulated by the state's public service commission, respondent Arizona Corporation

Commission. Mr. Brooks was dissatisfied with the rates set by the Commission and charged by the Cooperative for an extension of service to Mr. Brooks' home located in the Cooperative's service territory in southern Arizona. He sought and received Commission review of the rates through a complaint proceeding in 1987 and participated in the Cooperative's most recent rate setting hearing as an intervenor in 1988. Mr. Brooks did not timely appeal the Commission's orders in these cases to the Arizona superior court as provided by Arizona statutes. However, Mr. Brooks filed an untimely action in an Arizona justice court to protest the rates. The justice court suit was dismissed for want of jurisdiction.

More than a year after the Commission entered its rate order and two years after the Commission's order in the complaint proceeding, Mr. Brooks filed a complaint in the United States District Court for the District of Arizona against the respondents, protesting the Cooperative's rates. That court granted summary judgment in favor of respondents and dismissed the complaint against the Commission and the Cooperative, citing lack of subject matter jurisdiction under the Eleventh Amendment and the Johnson Act, 28 U.S.C. § 1342.

Mr. Brooks appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit. That court affirmed the dismissal of Mr. Brooks' complaint by the district court below. In its opinion, the Ninth Circuit found that the district court lacked jurisdiction because the Eleventh Amendment provided the Commission immunity from suit as a state agency; and, the Johnson Act's application to the complaint shielded both the Commission and the Cooperative from the action in federal court because Mr. Brooks' suit involved a claim for declaratory relief and compensatory damages related to state-approved utility rates that were subject to review under a plain, speedy and efficient state remedy.

REASONS FOR DENYING THE WRIT

The Court should deny Mr. Brooks' petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Mr. Brooks has not stated any reason why the opinion of the Ninth Circuit Court of Appeals is not in accord with other decisions of this Court or the decisions of other federal courts of appeal. Further, the Ninth Circuit's opinion in this case does not decide any new issue of federal law.

Mr. Brooks sets forth four questions for review. None present a basis for a writ of certiorari.

Question One: Was *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) wrongly decided?

The Court's opinion in *Atascadero* is in accord with a long line of decisions by this Court involving the Eleventh Amendment, beginning with *Hans v. Louisiana,* 134 U.S. 1, 10 S. Ct. 504 (1890). The Eleventh Amendment bars suits in federal court brought against a state, and *Atascadero* held that any waiver of that immunity must be clearly expressed. In this matter, Mr. Brooks has never advanced any argument that this immunity had been waived. Fundamentally, Mr. Brooks misunderstood the federal court's jurisdiction. As such, he has relied upon the arguments set forth in the dissent in *Atascadero* without relevant discussion or application to this case. Further, Mr. Brooks advances no rule or reason to revisit *Hans.*

Question Two: If *Atascadero* was decided correctly, have either or both conditions which waive sovereign immunity been met in this case?

Again, Mr. Brooks, by his question, fundamentally

misapprehends the jurisdiction of the federal courts. *Atascadero* decided that any waiver of immunity must be clearly set forth by an act of Congress. Mr. Brooks has never asserted that there is an act of Congress which waives the immunity of the Arizona Corporation Commission from suit in federal court.

Mr. Brooks' sole argument is that the Arizona Corporation Commission cannot be granted immunity because it is not in fact the State of Arizona. The Court of Appeals found that the Commission was an integral state agency and has immunity from Mr. Brooks' complaint by application of the test in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198 (9th Cir. 1989), *cert. denied,* 490 U.S. 1081, 109 S. Ct. 2102, 104 L. Ed. 2d 663 (1989). The *Mitchell* decision is in accord with opinions from this court and other circuits on this issue. *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690 n.55, 98 S. Ct. 2018, 2035 n.55, 56 L. Ed. 2d 611 (1978); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).

Question Three: Is the Johnson Act constitutional?

This issue was not presented to the district court. Mr. Brooks cannot raise it now. *See Brogan v. San Mateo County,* 901 F.2d 762, 765 (9th Cir. 1990).

Question Four: If the Johnson Act is constitutional, have all conditions required for the denial of federal jurisdiction under the Johnson Act been met in this case?

The Johnson Act imposes four conditions for reservation of jurisdiction in the state courts for issues concerning utility rates. The Ninth Circuit found that all four conditions had been met in this instance. Of particular interest was the court's discussion concerning whether petitioner has a plain, speedy and efficient

remedy in the state court. The Court of Appeals analyzed the state remedy and found that it met this test.

Although petitioner also argued that the state system violated due process, this issue was not presented to the district court and has not been preserved for review by this Court. *Brogan v. San Mateo County,* 901 F.2d at 765.

The Ninth Circuit Court of Appeals analysis of the Johnson Act is in accord with other circuits. *Miller v. New York State Pub. Serv. Comm'n,* 807 F.2d 28 (2d Cir. 1986); *Hanna Mining Co. v. Minnesota Power and Light Co.,* 739 F.2d 1368 (8th Cir. 1984); *Tennyson v. Gas Serv. Co.,* 506 F.2d 1135 (10th Cir. 1974). Further, the Court of Appeals appropriately applied the standard set forth by this Court in *Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 101 S. Ct. 1221, 67 L. Ed. 2d 464 (1981).

CONCLUSION

Finally, the opinion of the Ninth Circuit simply makes good sense. Mr. Brooks had a remedy in the Arizona courts. The policies embodied in the Johnson Act and this Court's evolving concept of federalism, *see, e.g., Zinermon v. Burch,* 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), requires that the petitioner seek his remedy there. Accordingly, both the district court and the Ninth Circuit Court of Appeals were correct in finding that the district court lacked subject matter jurisdiction over Mr. Brooks' complaint under the Johnson Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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